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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/027,887	10/25/2001	Peter P. Carabetta	79325	3223

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EXAMINER

MADSEN, ROBERT A

ART UNIT PAPER NUMBER

1761

DATE MAILED: 02/20/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/027,887

Applicant(s)

CARABETTA ET AL.

Examiner

Robert Madsen

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 November 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-25 is/are pending in the application.
- 4a) Of the above claim(s) 1-6 and 18-25 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 7-17 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>January 31, 2002</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Election/Restrictions

1. Applicant's election with traverse of claims 7-17 in the Response filed November 14, 2003 is acknowledged. The traversal is on the ground(s) that a single invention is defined by all of the claims. This is not found persuasive because the food product of claims 7-17 can be employed in environments other than the recited prepackaged mix kit of claims 1-6 and 18-25. Claims 7-17 recite the food product is "intended to be reconstituted", "intended to be packaged with a second product," and "intended to be utilized with said second product", and as such the food product may be packaged alone, or not at all, used alone, and may be for immediate use. Additionally, the recited kit in claims 1-6 and 18-25 does not require a dried cheese filler comprising at least on milk fraction. The requirement is still deemed proper and is therefore made FINAL.

Indefinite Claim Language

2. Claim 11 recites "wherein the flavoring comprises chocolate flavoring", but "the flavoring" lacks antecedent basis. Examiner understands this to mean "a flavoring".

3. Claims 13, 15, and 17, recite "wherein the dried cheese filler mix comprises from about XX% to about YY% by weight of the total weight of the mix of dried ricotta cheese mix". The term "the mix of dried ricotta cheese mix" lacks antecedent basis. It is also unclear to which "mix" (i.e. the food powder or the cheese filler mix) the term "XX% to about YY% by weight of the total weight of the mix" is referring. For examination

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purposes, the examiner understands claims 13,15, and 17 to mean XX-YY% of the food powder is a ricotta cheese filler mix (wherein the ricotta cheese filler mix comprises at least one dried milk fraction, as recited in claim 7).

Claim Rejections - 35 USC § 102

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

5. Claims 7,8,11,12 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Morano (US 5366750).

6. See Column 10, lines 35-40.

7. Claims 7,8,10 are rejected under 35 U.S.C. 102(b) as being anticipated by Guhl et al. (US 4427709).

8. Guhl et al. teach a powdered cheesecake mix (Abstract) comprising sugar, flavoring agents, and the dried cheese filler mix comprises milk solids and cheese powder (Column 2, lines 52-68, Column 3, lines 33-35).

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9. Claims 7-9 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by applicant's admission of the prior art as evidenced by Foremost Farms Annual Report (1999). Applicant discloses the Foremost Farms Recotta TM cheese mix is a dried Ricotta cheese made from whey, sweet cream, modified food starch, and citric acid. As evidenced by Foremost Farms Annual Report for 1999, this was a known ingredient for Italian entrees since 1999 (Page 7).

10. Claims 7 and 8 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Izzo et al. (US 3694231).

11. See Column 1, lines 32-44, Column 3, lines 3-16, Example 4.

12. Claims 7 and 8 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by LaBaw et al. (US 4904487).

13. See Abstract, Column 4, line 55 to Column 5, line 12.

Claim Rejections - 35 USC § 103

14. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

15. Claims 11-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Guhl et al. (US 4427709), as applied to claims 7, 8, 10 above, further in view of Harris (US 5250316).

16. Guhl et al. teach a powdered cheesecake mix (Abstract) wherein the dried cheese filler mix comprise 25-60% sugar, as recited in claims 15 and 17, 5-15% milk solids, 10-35% cheese powder (Column 2, lines 52--68), and flavoring agents (Column 3, lines 33-35). Taking the dried cheese filler mix to comprise the milk fraction (i.e. 5-15% milk solids) and the 10-35% cheese powder, Guhl et al. teach the dried cheese mix comprises 15-50% of the total mix, as recited in claims 13,15,17. However, Guhl et al. is silent in teaching ricotta cheese mix as recited in claims 13,15,17 or chocolate flavoring, as recited in claims 11,12,14,16.

17. Harris is relied on as evidence of the conventionality of making cheesecakes from ricotta cheese and chocolate, which may be used at a level of individual taste (Column 2, lines 8-44, Column 3, lines 27-31).

18. Therefore, it would have been obvious to include a chocolate flavoring, as recited in claim 11, which would serve as a chocolate substitute in that it is flavoring and not a solid piece of chocolate, as recited in claim 12 since Harris teaches cheesecakes may include chocolate flavorings. One would have been substituting one conventional flavoring agent for another for the same purpose: cheesecake. To select any particular level of chocolate flavoring, as recited in claims 14,16,17 would have been an obvious matter of choice, since Harris teaches one may add chocolate flavor at a level of individual taste. Furthermore, it would have been obvious to modify Guhl et al. and

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include anywhere from 15-50% dried cheese mix wherein the cheese is ricotta cheese, as recited in claims 13,15, and 17 ,since Harris teaches making cheesecakes with ricotta cheese, and one would have been substituting one conventional dried cheese for another for the same purpose: forming cheesecake.

Conclusion

19. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Morton (US 1514780),Kline et al. (US 2939792), Milani (US 2950978), Rivoche (US 3076709) and Moriano (US 3499768) teach food powders comprising dried cheese powders.

20. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 7:00AM-3:30PM M-F.


21. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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22. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert Madsen
Examiner
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